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May 24, 2006

Hon. Pete Hoekstra, Chairman
House Permanent Select Committee on Intelligence
H-405, the Capitol
Washington, DC 20515

Hon. Jane Harman
Ranking Member
House Permanent Select Committee on Intelligence
H-405, the Capitol
Washington, DC 20515

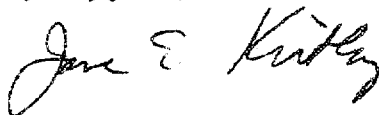
Dear Chairman Hoekstra and Ranking Member Harman:

I am writing in reference to the Committee's review of unauthorized disclosures of classified information, and the related May 26 public hearing on the media.

I would like to submit the following statement for the record. I am currently the Silha Professor of Media Ethics and Law, and Director of the Silha Center for the Study of Media Ethics and Law, at the School of Journalism and Mass Communication at the University of Minnesota. I am also an affiliated faculty member at the University of Minnesota Law School. From 1985-1999, I was the Executive Director of the Reporters Committee for Freedom of the Press in Washington, DC and Arlington, Virginia.

My affiliations are included for purposes of identification only. The statement I am submitting reflects my own views, and are not the views of the University of Minnesota or any other entity.

Very truly yours,



Jane E. Kirtley, J.D.
Silha Professor of Media Ethics and Law
Director, Silha Center for the Study of Media Ethics and Law

Statement of Jane E. Kirtley¹
Silha Professor of Media Ethics and Law
Director, Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
May 26, 2006

Concerns about unauthorized disclosure of classified information have prompted heated debate about the role of a free press in American society as the government has scrambled to stem the leaks and to determine the identity of leakers. In late April 2006, the Central Intelligence Agency fired Mary McCarthy, an analyst who is accused of having provided classified information to *Washington Post* reporters about secret United States-operated prisons in Europe where terrorism suspects are detained. Almost simultaneously, reports surfaced that the Federal Bureau of Investigation was trying to examine nearly 200 boxes containing papers belonging to the late investigative journalist Jack Anderson. A spokesman for the FBI was quoted as saying that the agency had “determined that among the papers, there are a number of U.S. government documents that contain classified information,” and further contending that “no private person may possess classified documents that were illegally provided to them.”²

¹The views expressed in this statement are the author’s, and do not purport to represent the views of the University of Minnesota or any other entity.

²See Scott Carlson, *Attempt to Screen Archive Prompts Fears*, CHRON. OF HIGHER EDUC., Apr. 28, 2006, at 1; Nick Timiraos, *Late Journalist’s Family Resists FBI Request for His Documents*, L.A. TIMES, Apr. 19, 2006, at A4.

Reaction to both of these incidents was swift, and outspoken. Some commentators accused McCarthy of being a traitor, and suggested that the reporters and news organizations who published the classified information were no better than traitors themselves.³ Others used the incidents as an object lesson in a basic principle: it is up to the government to keep its secrets, if it can. It is up to journalists to ferret out as much information as possible.⁴

Many journalists were outraged, as well as surprised, to learn that the government might have the power to go through boxes of material collected by a journalist and to repossess any classified documents that its agents might find.⁵ It seemed particularly chilling because the FBI justified its actions by claiming that the Anderson files might contain information relevant to the on-going prosecution of a former Pentagon official and two former lobbyists for the American Israel Public Affairs Committee (AIPAC) who are accused of violating provisions of the Espionage Act of 1917 by conspiring to communicate national defense information to persons

³See, e.g., Cal Thomas, *A traitor in our midst*, BALT. SUN, Apr. 26, 2006, at 13A; Bennett: Pulitzer Winners Risen, Lichtblau, Priest "Worthy of Jail," EDITOR & PUBLISHER, Apr. 18, 2006.

⁴See David S. Broder, *Tension Over Press Leaks; Government Has a Right to Keep Secrets – But Also a Duty to Be More Open*, WASH. POST, Apr. 27, 2006, at A27.

⁵See, e.g., Holly Mullen, *Family Tells Snoopers to Buzz Off*, SALT. LAKE TRIB., Apr. 20, 2006, available at http://sltrib.com/mullen/ci_3729452; Mark Feldstein, *A Chilling FBI Fishing Expedition*, WASH. POST, Apr. 29, 2006, at A17.

not authorized to receive it.⁶ In the past, the espionage statutes were utilized primarily to prosecute those who had committed classic espionage – selling secrets to agents of foreign powers.⁷ But some commentators have speculated that the prosecution of the AIPAC lobbyists is simply a prelude to the prosecution of journalists under the Espionage Act for receiving and disseminating classified information.⁸

It is not my intention here to debate the correct legal interpretation of the espionage statutes and their applicability to journalists. But I would like to point out that we have been down this road before. Almost exactly 20 years ago, then-CIA Director William J. Casey urged the Justice Department to prosecute news organizations under 18 U.S.C. § 798 for publishing classified information concerning interceptions of communications by the Libyan government, as well as NBC for reporting that accused spy Ronald W. Pelton may have given the Soviets information about an NSA project code-named “Ivy Bells” by which U.S. submarines

⁶18 U.S.C. § 793 (2005).

⁷An important exception was the prosecution of Navy analyst Samuel Loring Morison, for providing classified photographs to the British publication *Jane's Defence Weekly*. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

⁸See, e.g., Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, COMMENT., March 2006, available at <http://www.commentarymagazine.com/production/files/schoenfeld0306advance.html>

eavesdropped inside Soviet harbors.⁹ A bill sponsored by Sen. Ted Stevens (R-Alaska) designed to prevent convicted spies from profiting from their espionage activities included a provision that would have resulted in the mandatory forfeiture of "all property" used in the commission of the crime, which presumably would have included any news organizations convicted under the Espionage Act. As Rep. Don Edwards (D-Calif.), then-chairman of the House Judiciary subcommittee on constitutional rights, observed, "Coupled with Casey's threats to prosecute the press, this provision is frightening. Communications intelligence today means much of our intelligence product. If this provision is enacted, the media can publish stories on intelligence matters only at the risk of their businesses. Obviously, it will have a chilling effect."¹⁰

As it turned out, no prosecutions of the press resulted from these incidents. But recollecting them reminds us that the issues currently being considered by this committee are neither new nor novel. Trying to balance legitimate concerns about maintaining the secrecy of properly classified information against the role of the press to act as watchdog on the government and to keep the public informed raise genuine and compelling issues and challenges.

⁹See George Lardner Jr., *Justice Officials Cool to Idea of Press Prosecutions*, WASH. POST, May 8, 1986, at A3; see also Bryan Brumley, *Casey Charges NBC Violated Secrecy Law*, ASSOC. PRESS, May 20, 1986, available from Lexis-Nexis.

¹⁰George Lardner, Jr., *Media Assets May be Forfeit Under Spy Bill; Lawmakers' Efforts to Bar Profits in Espionage Cases Could Have a Hidden Side Effect*, WASH. POST, July 14, 1986, at A7.

Apart from the First Amendment implications, there are pragmatic considerations as well. During the 1986 furor over the press disclosures, Sen. Patrick J. Leahy (D-Vt.) was quoted in the *Washington Post* as saying “You should go after the persons doing the leaking. Going after the press raises some very serious First Amendment issues in my mind, and really won’t get at the problem.”¹¹ And as Retired Adm. Gene La Rocque, then-director of the Center for Defense Information, pointed out, pursuing the press can have other negative consequences by confirming that the disclosures are significant. He was quoted as saying that as a result of Casey’s denunciation of the NBC report, “the Soviets now know . . . that the information was highly sensitive, important and prejudicial to U.S. interests.”¹²

No journalist seeks to cause harm to national security. But “National security is public security, not government security from informed criticism.”¹³ As Benjamin C. Bradlee, then-executive editor of the *Washington Post*, wrote in June 1986, “[w]e do consult with the government regularly about sensitive stories and we do withhold stories for national security reasons, far more often than the public might think. [But] we don’t allow the government – or anyone else – to decide what we should print. That is our job, and doing it responsibly is what a

¹¹Id.

¹²Dana Walker, *Casey helping or hurting intelligence effort?*, UNITED PRESS INT’L, May 21, 1986, available from Lexis-Nexis.

¹³Morison, *supra* note 7, at 1082 (Wilkinson, concurring).

free press is all about.”¹⁴

Extending the espionage laws to prosecute individuals, like journalists, who disclose classified information but who are not engaged in classic espionage, would, as noted by Judge T.S. Ellis III, currently presiding over the AIPAC prosecution, “veer[] into ‘uncharted waters.’”¹⁵ As Judge J. Harvie Wilkinson wrote in his concurring opinion in the *Morison* case, “The First Amendment interest in informed public debate does not simply vanish at the invocation of the words ‘national security.’”¹⁶ He emphasized that the prosecution of a naval analyst who was subject to a non-disclosure agreement seemed to be consistent with the First Amendment, but “was not an attempt to apply the espionage statute to the press for either the receipt of publication of classified materials.”¹⁷ Judge James Dickson Phillips, concurring specially, observed that Judge Wilkinson appeared to be convinced that “the use of the statute [in that manner] will not significantly inhibit needed investigative reporting about the workings of

¹⁴Benjamin C. Bradley, *The Post and Pelton: How the Press Looks at National Security*, WASH. POST, June 8, 1986, at F1.

¹⁵Richard B. Schmitt, *Judge Calls Speech Right Central to Espionage Case*, L.A. TIMES, Apr. 2, 2006, at A14.

¹⁶*Morison*, supra note 7, at 1082.

¹⁷*Morison*, supra note 7, at 1086.

government in matters of national defense and security.”¹⁸ In the view of these judges, however, prosecutions of the press would raise entirely different constitutional questions.

As I testified before the House Judiciary Committee’s Civil and Constitutional Rights and Criminal Justice Subcommittees in 1989, “The tension between the government’s attempts to keep information secret, and the news media’s attempts to inform the public, is a struggle protected and encouraged by the First Amendment and the news media’s role in our constitutional system.”¹⁹ The resolution of these questions will never be easy. But surely the 25th anniversary year of the landmark “Pentagon Papers” decision by the Supreme Court,²⁰ is not the time to curtail the free flow of information to the public. Secrecy does not invariably enhance security. It often undermines it. Although it may be tempting to yield to the seductive allure of secrecy to preserve the illusion of security, illusions are not safe, and neither are citizens who are denied information.

¹⁸Id., at 1087.

¹⁹*Leaks During the Course of Criminal Investigations: Joint Hearing before the Subcomm. on Civ. & Const. Rights and the Subcomm. on the Judiciary*, 101st Cong. (Aug. 2, 1989) (statement of Jane E. Kirtley, Exec. Dir., Reporters Comm. for Freedom of the Press).

²⁰*New York Times Co. v. United States*, 403 U.S. 713 (1971).